1990

State of Utah v. Donald Wayne Brown : Brief of Appellant

Utah Supreme Court

Nathan Hult; Attorney for Appellant.
R. Paul Van Dam; Attorney for Appellee.

BRIEF

900148

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	*	
Plaintiff/Appellee,	*	
vs.	*	CASE NO. 900148
DONALD WAYNE BROWN,	*	Priority 2
Defendant/Appellant.	*	

BRIEF OF APPELLANT

Appeal from the First District Court
Box Elder County, Judge F. L. Gunnell

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this appeal pursuant to Utah Code 78-2-2(3)(i), in that this case involves a conviction of a first degree felony.

ISSUES PRESENTED FOR REVIEW

1. Should the Defendant's knife and bag of clothing, seized without a warrant from the trailer in which he was residing, have been suppressed? The standard of review is whether it clearly appears that the lower court was in error in its factual assessment underlying a decision to deny a suppression motion. State v. Ashe, 745 P.2d 1255 (Utah 1987).

2. Was the Defendant deprived of the effective assistance of counsel when counsel, at the court's encouragement, proceeded in taking over the examination of witnesses from the Defendant after counsel stated he was not prepared to proceed? The standard of review is whether counsel rendered a deficient performance in some demonstrable manner and whether the outcome of trial would probably have been different but for the error. State v. Geary, 707 P.2d

645.

3. Does the appointment of a part-time city attorney and prosecutor to represent an indigent defendant constitute a conflict of interest and deny the defendant due process? The standard of review is strictly a determination of constitutional law and judicial administration by this court.

4. Does the prosecuting attorney's reference to Defendant and three co-defendants, in closing argument, as "four mad dogs" constitute reversible error? The standard for review is whether misconduct occurred and whether the jury was probably influenced by the remarks. State v. Troy, 688 P.2d 483 (Utah 1984).

5. Did the trial court err in permitting evidence of prior bad acts of the Defendant? The standard for review is whether the trial court abused its discretion. State v. Miller, 709 P.2d 350 (Utah 1985).

6. Did the trial court's decision to permit the jury to deliberate for 13 1/2 hours through the night after a full fourth day of trial deprive the Defendant of the full benefits of his right to a jury? The standard of review regarding issues of jury deliberation is abuse of discretion. State v. Lactad, 761 P.2d 23.

7. Was the jury instruction regarding jury deliberation improper as being unduly coercive of dissenting jurors? Because the correctness of a jury instruction is an issue of law only, no deference is granted to the trial court. Ramon v. Farr, 770 P.2d 131, 133 (Utah 1989).

8. Was there insufficient evidence to support the conviction

of aggravated assault on Richard Anderson? The standard of review is whether there is some evidence from which findings of all the requisite elements of the crime can reasonably be made. State v. Booker, 709 P.2d 342 (Utah 1985).

9. Was it improper for the court to order an indigent Defendant to reimburse the county for all costs of defense including attorney's fees? The standard of review is abuse of discretion.

DETERMINATIVE LAW

The interpretation of the following constitutional provisions, statutes, and rules is determinative of the issues involved:

Issue 1. 4th Amendment of U.S. Constitution

Article I, Section 14 of Constitution of Utah

Issue 2. 6th Amendment of U.S. Constitution

Article I, Section 12 of Constitution of Utah

Issue 3. 6th Amendment of U.S. Constitution

Article I, Section 12 of Constitution of Utah

Issue 4. Code of Professional Responsibility, Rule 3.4(e)

A lawyer shall not:

> (e) . . . In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

A.B.A. Standards for Criminal Justice 3-5.8

(a) . . .

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor shall not use arguments calculated to inflame the passions or prejudices of the jury.

Issue 5. Rule 404, Utah Rules of Evidence

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) . . .

(3) . . .

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405, Utah Rules of Evidence
Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is essential element of a charge, claim, or defense, proof may also be made of specific

instances of his conduct.

Issue 6. 6th Amendment of U.S. Constitution

Article I, Section 12 of Constitution of Utah

Issue 7. 6th Amendment of U.S. Constitution

Article I, Section 12 of Constitution of Utah

Issue 8. Utah Code 76-5-103

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) . . .

(b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

Utah Code 76-5-102

(1) Assault is:

(a) . . .

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) . . .

Utah Code 76-10-506

Every person, except those persons described in Section 76-10-503, who, not in necessary self defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class B misdemeanor.

Issue 9. Utah Code 77-32a-3

The court shall not include in the judgment a sentence that a defendant pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the

financial resources of the defendant and the nature of the burden that payment of costs will impose and that restitution be the first priority.

6th Amendment of U.S. Constitution

Article I, Section 12 of Constitution of Utah

STATEMENT OF THE CASE

According to Eddie Apadaca, one of the State's three eyewitnesses, the Defendant, along with eight other employees, in the evening of October 25, 1989, were in the camp of the Western Brine Shrimp Company on the northwestern side of the Great Salt Lake. During the late evening hours, one of the crew, William Cummins, who stayed in trailer number three with Billy Cayer and the Defendant, went to trailer number two and asked Eddie Apadaca to come over to his trailer to talk. A roommate of his, Cabututan was already there. Cummins accused him of telling Don Brown, the Defendant, who had been with the crew approximately a week, that he was a foreman. All four in the trailer had had some alcohol to drink. Another member of the crew, from his own trailer, Ray Cabututan got upset with him for not having helped him with some work, started hitting him, and threw a sharpening stone at him, hitting him on the head.

Eddie ran back to his trailer. A short time later, Cayer, Cummins, Cabututan, and Defendant went to trailer number two. Cabututan had nunchukas. Mike, the victim, jumped between Eddie and the four who entered. Cummins said to get the hunting knife from Mike's pocket. Michael was pushed back and drew his knife (T

211:113). At that time, Brown, the Defendant, had a knife out also (T 211:17). Mike dropped his knife and Defendant folded his up and put it away. The Defendant, Cummins and Cabututan escorted Mike out of the trailer. Cayer remained with Apadaca.

Cayer swung at Apadaca a few times until the Defendant came back in, told Cayer to leave him alone and then told Apadaca to get his things and leave. Meanwhile, Cabututan had come in and taken Mike's knife from the bed and left.

When he exited trailer number two, Apadaca saw Mike on the ground in front of the door and Cummins and Cabututan kicking and hitting him (T 218:14-17). Cayer was a short ways away. Cummins struck Apadaca as he came out and knocked him down (T 219:4), and when he got up Cabututan stepped in front of him with a crescent wrench in his hand (T 220:3-10). He ran out of camp, and part way up a hill, glanced back and could see Mike still lying on the ground with people around him but couldn't tell how many (T 222:4-8). The only light was from windows of the trailers. He kept running. In the morning, he saw Anderson & Galardo and rode back to near the camp with them to wait for law enforcement officers to arrive.

According to Richard Anderson, who shared trailer number one with Galardo and Tilley, he was awakened that night, put on his clothes and looked out the door (T 314:22). When he opened the door, he saw one man on the ground and four men around him. The Defendant, holding the crescent wrench, pulled his hand back and asked him if he wanted some of it too (T 319:10-13). Anderson

stepped back in, shut the door and had a discussion with his three roommates.

After reopening the door, he saw Cabututan attempt to stab Mike with a knife and then hit him in the head with the crescent wrench (T 327:23-25). He saw Cabututan, Cummins and the Defendant hit and kick him. He didn't see Defendant at any time with a knife or hit Mike with the wrench. He admitted that at preliminary hearing he had said he saw silhouettes around the man on the ground (T 414:18-23).

After the fight, Mike got up, went into his trailer and washed himself off. Early the next morning, Anderson heard a knock on the door. Mike was sitting on a pallet outside the door, asked them to call 911, that he couldn't breathe and wanted a drink of water. After a drink of water, he collapsed and died.

Eric Tilley, the third State's eyewitness, also looked out the south door of trailer one (T 482:8) saw Mike on the ground with three persons around him, Cayer and Cabututan, and the third being either Cummins or the Defendant, but uncertain. Cummins and Defendant had similar physical characteristics (T 483:5-14). According to him, and contrary to Anderson, the door of the trailer was shut after that and he didn't see any more of the fight. Also, contrary to Anderson, the fight lasted 10 to 15 minutes (T 490:3) rather than 45 minutes and he went to the south end of the trailer when Richard reopened the door (T 491:3-5). The fight was over and Mike was standing there.

The Defendant testified that he went over to where Cummins and

Mike were fighting and Cummins asked him to get Mike's knife, and he went down but couldn't find it (T 801:9-14). Cabututan had the crescent wrench and had jumped in and was hitting and kicking Mike (T 802:18-21). He broke up the fight by dragging Cummins off of Mike (T 803:10-21). The fight started because Cummins was upset about Mike having cut his buddy, Cayer, with his knife (T 801:14-24), a matter substantiated by Apadaca (T 283:11-19).

According to the medical examiner, the cause of death was multiple blunt force injuries to the head and torso (T 538:5). Two of the injuries were with a wrench (T 538:15). There were also three cuts. There was no specific injury that could be identified as the lethal blow (T 549:2).

The Defendant together with Cummins, Cabututan, and Cayer were arrested and removed from camp. Thereafter, a search of Defendant's trailer was made at which time a pink laundry bag containing a pants and shirt of his were seized. The next day, his folding knife in the same trailer was seized. Both seizures occurred without a warrant. A state lab serologist testified that the pants and shirt both showed positive indications of blood but insufficient for further identification (T 622:13-14). The knife likewise had indications of blood but insufficient for further identification (T 649:1-4). The boots taken from Defendant when he was arrested tested positive for human blood but could not be typed (T 631:5-10). Clothing of other defendants showed antigens consistent with the victims blood type. The defense introduced a picture taken a day after the arrest showing a cut to one of

Defendant's fingers which Defendant sustained earlier the day of the fight while loading shrimp eggs (T 781:25-783:25).

Prior to trial, the Defendant filed a motion to suppress evidence and a motion to dismiss his court-appointed attorney. The first motion was denied and the latter was granted with the appointed attorney available for assistance. The trials of the co-defendants were severed with Defendant's case being tried last. During the trial, when the Defendant experienced great difficulty in cross-examining the State's witnesses, counsel was requested to proceed with the cross-examination and the rest of the trail. The jury deliberated for 13 1/2 hours after a full fourth day of trial despite counsel's request that they be permitted to rest. The Defendant was found guilty of second degree homicide of Mike Ramirez and aggravated assault of Richard Anderson. From conviction of those charges he has appealed.

SUMMARY OF ARGUMENT

I. Defendant's knife and bag of clothing, seized after his arrest without a warrant, should have been suppressed.

II. The Defendant was deprived of the effective assistance of counsel when counsel proceeded in taking over the examination of the witnesses from the Defendant despite stating that he was not prepared to proceed.

III. The appointment of a part-time city attorney and prosecutor to represent the Defendant constitutes a conflict of interest and denied the Defendant due process.

IV. The prosecuting attorney's misconduct in referring to the Defendant, and three co-defendants, in closing argument as "four mad dogs" constitutes reversible error.

V. The trial court erred in permitting evidence of prior bad acts of the Defendant.

VI. The trial court's decision to permit the jury to deliberate for 13 1/2 hours through the night after a full fourth day of the trial deprived the Defendant of the full benefits of his right to a jury.

VII. Jury instruction 50 was unduly coercive in encouraging dissenting jurors to compromise a conviction.

VIII. There was insufficient evidence to support the conviction of an aggravated assault on Richard Anderson.

IX. It was improper for the court to order an indigent Defendant to reimburse the county for all costs of defense including attorney's fees.

ARGUMENT

I.

DEFENDANT'S KNIFE AND BAG OF CLOTHING, SEIZED AFTER HIS ARREST WITHOUT A WARRANT, SHOULD HAVE BEEN SUPPRESSED.

The Defendant and three co-defendants were arrested October 26, 1989 and handcuffed at 8:35 AM (T(A) (suppression hearing on January 24), p. 23:7). They were placed in a trailer different from the one in which they'd been living and kept there until a jail van took them at 11:15 AM (T(A)22-23). Several officers initially went through trailer number three but no weapons were

observed (T(A)17:4). Officers at two other times entered that trailer to get medicine and cigarettes for the prisoners (T(A)18 & 75). The trailer was entered two more times, once to obtain a ground to ground radio to communicate with one of the owner's of the business enterprise and trailer who lived in Salt Lake City and the second time for a thorough search of the premises at which time a pink bag belonging to the Defendant was seized (T(A)81:3). The bag contained Defendant's clothing including a pair of pants and a sweatshirt and both had "positive indications" of blood but there was no identification as to whether it was human or as to type (T. 622).

There were four trailers on the premises. Trailer number three was stipulated to be the trailer that was the living quarters of three of the co-defendants, Cummins, Cayer, and Brown, and in which they kept their personal property (T(A)40). Perishable food items were primarily kept in the refrigerator in trailer three (T(A)65:25) for all the residents of the camp and the ground to ground radios were kept there (T(A)64:5) but the common practice was to knock before going in someone else's trailer (T(A)66:13), there was a privacy interest (T(A)66:17), and they wouldn't go in someone else's trailer unless they were there (T(A)70:9).

Prior to the search, the officers contacted Mr. Bentzley in Salt Lake City by radio, who gave them permission to search the premises (T(A)83:13). The search was conducted at approximately 1:00 PM (T(A)43:8). During the earlier entries into the trailer, the officers had specifically observed, among those items

eventually seized, a pasteboard box with blood on it, tennis shoes, a crescent wrench, and hip waders (T(A)29:17-30:11 and 75:16-76:22). The pink bag with clothing and white folding knife, one of three knives found and seized at the scene, were not identified as having been observed prior to the thorough search conducted that afternoon. This particular knife was observed and examined during the search (T(A)82) but wasn't retrieved until the next day (T(A)94:6). The prosecutor admitted that no warrant was used (T(A)5:8). Nor was any magistrate ever called about obtaining a search warrant (T(A)94:9-11).

The trial court denied the motion to suppress on three bases. That the search and seizure had been: 1) incident to an arrest (T(A)119-120), 2) exigent circumstances of distance, a homicide, dissipation of blood, access of other employees to the premises, rain and snow nearby, and a great deal of agitation and distress (T(A)120-121), 3) plain view (T(A)121), and 4) consent by the owner (T(A)122).

The warrantless search should not have been sustained on any of these four grounds. It can't be justified as incident to the arrest. The prisoners were arrested and handcuffed and placed in a separate trailer 4 1/2 hours before the search was conducted and were taken from the scene by a jail van at least 1 1/2 hours beforehand. A search for weapons had already been performed.

Nor can the search be sustained on the basis of exigent circumstances. None of the circumstances articulated by the trial judge were such as to make a search without a warrant imperative.

While there was a substantial distance to town, the jail van had been called out to the scene, a co-owner of the enterprise had been contacted and no showing was made that a warrant could not have been obtained. The fact of a homicide having been committed or any agitation or distress it may have caused the officers has never been viewed as circumstances in and of themselves excusing the requirement of a search warrant. No showing was made that blood dissipates more quickly than the time required to secure a warrant, employee access to trailer three could have been restricted by one or more of the numerous officers at the scene, and there was no showing that the wet weather conditions would have affected any of the contents of the trailer.

These "exigent circumstances" are certainly not of the type recognized in State v. Ashe, 745 P.2d 1255 (Utah 1987) where there was an expectation that a drug transaction would be completed within minutes, a person looked out a window as the officers approached and the court concluded that the officers were not in a position to secure a warrant.

> The exceptions are "`jealously and carefully drawn,' and there must be a `showing by those who seek exemption ... that the exigencies of the situation made [the search] imperative.'"

State v. Ashe, at 1258 quoting Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed 2d 564.

In this particular case, a telephone search warrant was not attempted. The availability of such warrants under Utah Code 77-23-4(2) in this state makes this case similar to that of State v. Northrup, 756 P.2d 1288 (Utah App. 1988) where there was sufficient

time to obtain such a warrant but no attempt was made to do so.

The trial court further justifies the warrantless search under the plain view doctrine. The Defendant concedes for the sake of argument that the earlier entries were valid for weapons search, obtaining medication and cigarettes at request of the occupants, and to obtain a ground radio. However, of the items seized, only a cardboard box with blood, tennis shoes, crescent wrench, and hip waders had been noted by the officers and not the items identified with the Defendant, the pink clothes bag and folding knife. These were not observed until the subsequent entry made specifically for the purpose of search and seizure of evidence. Only the four items observed by the officers during their earlier entries into the trailer would be permitted under the plain view exception to the search warrant requirement. State v. Kelly, 718 P.2d 385 (Utah 1986).

Further, as to the knife seized the following day, Kelly makes clear in footnote 1 that plain view may not be used as a pretext for a warrantless search and seizure where the officers know in advance that an item will be present and use that knowledge as justification for a warrantless search and seizure.

Finally, the justification of consent must fail. The trailer was the residence of the Defendant and two of the co-defendants. Though in terms of employment, the relationship between the owner and the Defendant was employer-employee, the relationship with regard to the trailer was one of land-lord tenant. The general rule, recognized in State v. Kent, 432 P.2d 64 (Utah 1967) is that

the consent of an owner or landlord, is not sufficient to justify a warrantless search of the tenant's residence.

Though trailer number three was also used to store perishable foods for other members of the crew and the ground to ground radios, State's witness Anderson testified that there was a privacy interest, the common practice was to knock before going in and that they wouldn't go in someone else's trailer unless they were there.

The rule requiring a warrant is not otherwise merely because the lessor has by express agreement or by implication reserved a right to enter for some special or limited purpose. State v. Johnson, 701 P.2d 239, aff'd 716 P.2d 1288 (Id. 1985).

An owner who stores goods on premises may have an implied consent to enter at reasonable times to exercise dominion over goods but that does not give the owner carte blanche to consent to a police search of the premises. People v. Escudero, 592 P.2d 312 (Cal. 1979).

The seizure of the Defendant's clothes bag with the pants and shirt therein and his folding knife should have been suppressed under either the state or the federal constitutions.

II.

THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL PROCEEDED IN TAKING OVER THE EXAMINATION OF THE WITNESSES FROM THE DEFENDANT DESPITE STATING THAT HE WAS NOT PREPARED TO PROCEED.

The Defendant filed a Motion For Dismissal of Attorney (Addendum, Exhibit A) a week before trial on February 5, 1990. At a hearing on that Motion on February 8, Mr. Willmore, the court-

appointed attorney, stated that the breakdown in the relationship began with disagreement over certain defenses. "I felt that Mr. Brown shouldn't and then Mr. Brown made the decision that he wanted to do it this way, in his way, and that's it." (T(B)(Feb. 8 hearing), 13:18-21). The Defendant stated he wanted to act as his own attorney (T(B)14:15-19). After further questioning, the court granted Defendant's Motion but required that Mr. Willmore be available during trial for consultation and assist on the selection of the jury (T(B)22:1-14). The Defendant further requested that Mr. Willmore make the opening statement and closing argument for him (T(B)26:24-25).

During the course of the trial, the Defendant at times had difficulty conducting the cross-examination of the State's first witness, Eddie Apadaca (Example: T 255-256). He was quite ineffective in cross-examining the next witness, Richard Anderson, gave up in his attempt at cross-examination, and Mr. Willmore asked permission to ask further questions in areas not yet covered (T 386:4-8). During the ensuing conference in chambers, the court granted permission for the trial to be turned over to Tom Willmore (T 397). However, the court asked him if he was prepared to proceed. He responded, "I wasn't prepared to question Richard Anderson and Eric Tilley, but I will do it." (T 397:23-25). The court mentions that Willmore was at the preliminary hearing and has a transcript. Willmore responded: "I've gone over it all, but as far as being prepared to the point where I normally am, what I would like to be, I am not. But I will go ahead, if that's what

Don wants." (T 398:6-9). Neither the court nor Willmore suggested a recess despite Willmore's statement of inadequate preparation for these suddenly changed circumstances and court immediately went back into session.

There was a need for well-prepared, close, and extensive cross-examination of the three state's witnesses who had been members of the crew at the camp. Substantial discrepancies between the witnesses as to Defendant's degree of involvement in the fight had been developed in an extensive preliminary hearing, the transcript of which filled four volumes and 949 pages. This was in addition to voluminous hand written statements and transcribed interviews of each of these witnesses and partial transcriptions of their testimony at the trials of the co-defendants that preceded Defendant's.

The exact conduct of the Defendant observed by these witnesses, the opportunity to observe from distances, in dim lighting, with lines of sight cut off by doorways and trailers, and the point in time in the progress of the fight in which any conduct of Defendant's was observed were crucial to Defendant's claim of peripheral involvement in the altercation of trying to locate and take from the victim a knife he was purportedly carrying and that if he was guilty of anything, it should have been of one of the lesser included offenses.

The Defendant further alleges that due to lack of sufficient preparation and despite Defendant's request, counsel declined to call one of the co-defendants, Ray Cabututan, as a witness. In his

own earlier trial, Cabututan had testified: "I had the wrench. Nobody had the wrench but me. You know, that's what they're fabricating." (Addendum, Exhibit B. p. 270 of Cabututan's trial transcript). Cabututan, in his trial, had alleged self-defense with the wrench when attacked by the victim with a knife.

In evaluating the issue of adequacy of counsel under these circumstances, it should first be emphasized that this was not a case where the Defendant was manipulating his right to counsel for purposes of delay and disruption. State v. Johnson, 651 P. 2d 247 (Wash. App. 1982). It appears that the Defendant had some basic disagreements with his counsel as to what defenses should be presented and he felt he could do a better job in getting his point of view across. He fell flat on his face and his attorney was unprepared to step in at that precise moment. The trial should have been adjourned, at least until the next day, to permit his counsel to make adequate preparation. The constitutional right to have the assistance of counsel carries with it a reasonable time for consultation and preparation. State v. Barker, 667 P. 2d 108 (Wash. App. 1983).

Murder in the second degree requires a showing of an intent to cause serious bodily injury or, with depraved indifference knowingly engaging in conduct which created a grave risk of death. The Defendant was entitled to and obtained instructions on the lesser included offenses of manslaughter, negligent homicide, aggravated assault, and assault. Careful, well-prepared cross-examination would probably have shown that at most, the Defendant's

conduct was reckless, if aware of the risk of death, hence manslaughter, or was an intentional infliction of serious bodily injury, hence aggravated assault. Had Cabututan been called, his testimony regarding his sole possession of the wrench during the fight would probably have affected the verdict on the homicide charge and exonerated the Defendant on the charge of aggravated assault against Anderson.

Regardless of the Defendant's role in placing his counsel in the awkward position of having to proceed immediately though ill-prepared to do so, the Defendant has been deprived of effective assistance of counsel if counsel rendered a deficient performance in some demonstrable manner and the outcome of trial would probably have been different but for the error. State v. Geary, 707 P. 2d 645. In this case, the error was in counsel failing to ask for adjournment to be able to make adequate preparation despite the court's encouragement to immediately go forward as well as the court requiring counsel to immediately proceed.

III.

THE APPOINTMENT OF A PART-TIME CITY ATTORNEY AND PROSECUTOR TO REPRESENT THE DEFENDANT CONSTITUTES A CONFLICT OF INTEREST AND DENIED THE DEFENDANT DUE PROCESS.

Prior to trial, the Defendant felt that Thomas Willmore was not representing his best interests and filed a pro se Motion For Dismissal of Attorney (Ct. Rcd. 242-245). While Mr. Willmore's status as a city attorney and prosecutor was not stated in the motion and was probably unknown to the Defendant at the time, that

situation came to light during the selection of the jury.

During the questioning of Mr. Munns, Mr. Willmore identifies himself as the prosecutor for Garland City and that the prior year he prosecuted a member of Mr. Munns family and then proceeded to inquire if Mr. Munns had any ill feelings towards him (T. 84-86).

It does not appear that the Utah courts have addressed the issue of whether a city prosecuting attorney can or should represent a defendant being prosecuted by the county or state. While courts have been unanimous in prohibiting a prosecutor from defending a client from prosecution by the same governmental entity that he is employed by, there is also some authority that part-time prosecutors for state governmental subdivisions should also not be defending criminal cases. Professional Responsibility of the Criminal Lawyer, John Wesley Hall, Jr., 1987, The Lawyer's Cooperative Publishing Company, p. 405; Howerton v. State, 640 P.2d 566 (Okl. Crim. 1982).

Among the reasons stated in Goodman v. Peyton, 351 F.2d 905 (4th Cir. 1965) for reversal of a conviction where a part-time district attorney was appointed to represent an indigent defendant was that effective representation may mandate attacking state laws which it is prosecutor's function and perhaps sworn duty to uphold, and may require an attack on methods used by law enforcement which he seeks to enforce and justify in the prosecution function. These conflicts are as real whether the attorney works for the state, a county, or a municipality.

An additional problem, not stated in Goodman is the appearance

of a conflict to the unsophisticated lay defendant. At a minimum, the employment in a prosecutorial capacity should be disclosed to the defendant in advance so that he can make a reasoned decision.

While it is impossible for the Defendant to prove that if Thomas Willmore was not employed as city attorney and prosecutor for Garland City, he would have provided more effective assistance of counsel, he does assert that such may have been a factor in some of the deficiencies pointed out in his Motion For Dismissal of Attorney (Addendum, Exhibit A).

IV.

THE PROSECUTING ATTORNEY'S MISCONDUCT IN REFERRING TO THE DEFENDANT, AND THREE CO-DEFENDANTS, IN CLOSING ARGUMENT AS "FOUR MAD DOGS" CONSTITUTES REVERSIBLE ERROR.

The prosecuting attorney, in closing argument, stated as follows: "There isn't one of us here who knows how he would react in a situation like that with four mad dogs out there beating on somebody. (T. 911:20-22) Objection was made by defense counsel. (T. 912:2) Use of this inflammatory language was in derogation of the Code of Professional Responsibility, Rule 3.4(e), which prohibits the prosecuting attorney from making expressions of personal opinion of guilt and the A.B.A. Standards for Criminal Justice 3 - 5.8 (2d ed. 1982) which prohibits the same as well as use of argument "calculated to inflame the passions or prejudices of the jury."

The leading Utah cases dealing with prosecutorial misconduct provide a two-step evaluation process; whether misconduct occurred

and whether the jury was probably influenced by the remarks. State v. Troy, 688 P.2d 483 (Ut. 1984), State v. Valdez, 513 P.2d 422 (Ut. 1973). The use of the epithet, "four mad dogs", while not repeated is the type of phrase that penetrates the mind and understanding of a listener and is specifically designed to inflame the passions or prejudices of the jury. It is a stronger term than the terms "crud" and "child molester" in Patterson v. State, 747 P.2d 535 (Alaska 1987) and "yo-yo", "stupid", "thief" and "crook" in State v. Diaz, 668 P.2d 326 (N.M. App. 1983). Nor need bad faith be shown. State v. Lafferty, 749 P.2d 1255 (Ut. 1988). Step one is clearly met.

As to step two, the jury was probably influenced by the remark. State v. Troy, 688 P. 2d 483, 486, points out that in a case with less compelling proof, such as this, the Court will more closely scrutinize the conduct, and that if there is conflicting evidence or evidence susceptible of differing interpretations, "there is a greater likelihood that they [the jury] will be improperly influenced through remarks of counsel.

The degree of Defendant's involvement in the assault on the deceased was strongly in dispute in this case, with the testimony of three State's eye-witnesses varying greatly, and the Defendant's conduct being susceptible to many interpretations represented by a full range of lesser included offenses submitted to the jury. The final conclusion of the jury after 13 1/2 straight hours of deliberation through the night could, in the exhaustion of the morning hours, have been swayed by this mind-grabbing label put

forth by the prosecutor.

V.

THE TRIAL COURT ERRED IN PERMITTING EVIDENCE OF PRIOR BAD ACTS OF THE DEFENDANT.

During the redirect examination of one of the State's witnesses, Richard Anderson, the court permitted the prosecuting attorney, over defense counsel's objection, to inquire as to an alleged statement of the Defendant exhibiting belligerency by the Defendant toward a member of the crew other than the victim of the assault in this case. That evidence was offered to prove the aggressive character of the Defendant and is prohibited under Rules 404 and 405 of the Utah Rules of Evidence.

The testimony elicited was as follows:

> Q. And do you recall what Brown [Defendant] told you regarding that altercation? [T. 432:18] . . .[objection interposed]
>
> A. He was - his - his statement was, I'd like to see Mr. - or Ed take a dip in the lake and not come back up. [T. 433:9]
>
> Q. Okay. And do you recall approximately when that was?
>
> A. No. Earlier in the week or something. You know, Monday or Tuesday or somewhere around there.

This testimony was permitted by the Court because the Defendant, acting pro se, had earlier asked this same witness, on cross-examination:

> Q. Have you ever - have you ever <u>seen</u> at any time out there when working with Don Brown that he ever became belligerent or had any trouble with anybody? I'm talking about Don Brown. I'm not talking about they or them.
>
> A. He had a problem with one of the workers. Ed. [T.

377:21-25] [Thereafter Defendant confers with his court-appointed attorney and drops this line of questioning.]

Under Rule 404(a)(1), evidence of a pertinent trait of the accused's character can be offered by the prosecution only to rebut evidence of the same offered by the accused. The Defendant was notably unsuccessful in his attempt to elicit evidence of his peacefulness from this State's witness so that there was no character evidence to rebut. Nor was the character of the Defendant an essential element of a charge, claim, or defense permitting such evidence under Rule 404(b). State v. Miller, 709 P.2d 350 (Ut. 1985).

Even if character evidence would be permissible under Rule 404, such evidence would have to be limited to reputation or opinion. Under Rule 405(a) inquiry as to specific instances is permitted only on cross-examination, not on re-direct. Nor would such method of proving character be admissible under Rule 405(b) where the character trait of the defendant was not an essential element of a charge, claim or defense. State v. Miller, 709 P.2d 350 (Ut. 1985).

In this case the trial court misperceived Rule 404 to permit evidence of specific instances of Defendant's conduct even where there was no evidence to rebut, permitting the prosecutor to use the Defendant's blundering attempts at cross-examination as a pretext.

Nor is this harmless error given the Defendant's minimal participation in the assault, if any, compared to the two primary protagonists, William Cummins and Ray Cabututan, the jury's lengthy

deliberation of 13 1/2 hours, and the highly prejudicial nature of the alleged statement.

VI.

THE TRIAL COURT'S DECISION TO PERMIT THE JURY TO DELIBERATE FOR 13 1/2 HOURS THROUGH THE NIGHT AFTER A FULL FOURTH DAY OF THE TRIAL DEPRIVED THE DEFENDANT OF THE FULL BENEFITS OF HIS RIGHT TO A JURY.

The jury began its deliberation at approximately 5:15 PM on the fourth day of the trial. (T. 940:2) At 3:35 AM defense counsel made a motion that the jury be allowed to rest and come back in the morning on the grounds that they'd been deliberating for 10 hours after a full day of trial and must be tired. The prosecutor objected to them being separated and suggested the court would have to place them in a motel. The court denied the motion but said he'd find out if they'd arrived at a verdict. (T. 942-943)

An hour later, at 4:30 AM, the court convened and the bailiff reported the jury had said they were moving along and shouldn't be much longer. At 6:45 AM the jury returned with a verdict of guilty as charged.

The Defendant is entitled to a trial by jury which includes an independent decision by each of the jurors as to the Defendant's guilt or innocence. While the court is given wide discretion regarding the length of deliberation, that discretion is abused if the Defendant is deprived of the considered judgment of each juror.

To believe that the entire jury could remain engaged in the deliberation process for 13 1/2 hours after a full fourth day of the trial stretches credulity. It is unreasonable to believe that

all the jurors could have remained alert for that length of time. The memory and analytical skills of the jurors would certainly begin to fade and the wills of any minority jurors would be easily overborne after that length of time. To merely inquire after ten hours if the jury had a verdict and continue the process for an additional three hours, upon word from the bailiff that they were moving along and shouldn't be much longer, is to give too much deference to those on the jury that wanted to get the job over and done with at the expense of the Defendant.

In Isom v. State, 481 So.2d 820 (Miss. 1985), where the jury, in a manslaughter trial, deliberated from approximately 3:30 PM to 10:30 PM after 1 1/2 days of hearing the trial of the case, where several jurors expressed a desire to recess deliberations, and where the trial court sent the jury back for further deliberations, at which time the jury returned a verdict in about 30 minutes, the time for continuous deliberation was held to be excessive.

This court should hold as a matter of judicial administration if not Constitutional law, that keeping a jury in deliberation continuously for 13 1/2 hours after a full day of trial deprives the Defendant of due process and fair trial by jury under the state and federal Constitutions.

VII.

JURY INSTRUCTION 50 WAS UNDULY COERCIVE IN ENCOURAGING DISSENTING JURORS TO COMPROMISE A CONVICTION.

The instruction to the jury on the matters of their deliberation and returning a unanimous verdict included the

following language:

> A dissenting Juror should consider whether their state of mind is a reasonable one, when it makes no impressions on the minds of so many Jurors equally honest, equally intelligent, who have heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath.

(Ct. Rcd. 417) (Addendum, Exhibit C).

The court should have given Defendant's proposed instructions, p. 30 and 31 (Court Record 304 and 305) which present the duties of the jury, particularly dissenting members, in a much less coercive, and hence, fairer manner. The language in the trial court's instruction violated the Defendant's right to jury under both the Federal and State Constitutions and is in derogation of the A.B.A. Standards Relating to Trial, Section 5.4(a) which sets out a proper instruction to the jury before they begin deliberation. (Addendum, Exhibit F). The court's instruction improperly focuses on a dissenting juror at the very beginning of deliberation, states perhaps incorrectly that the opinion of a dissenting juror has made no impression on the other jurors, and gives a directive, in the nature of a presumption, that all jurors are to be regarded as equally honest and intelligent with equal desire to arrive at the truth.

Such an Allen instruction, Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L.Ed. 528 (1896), has no place at the beginning of deliberations and probably should not even be given later in circumstances of a hung jury. It encourages jurors with an initial minority opinion to more readily surrender that opinion and deprives the Defendant of the benefit of the convictions of

each individual juror.

The Utah courts have not yet decided whether a trial court is ever entitled to give an Allen-type instruction. In State v. Thomas, 777 P. 2d 445, the supplemental oral instructions didn't come close and in State v. Medina, 738 P. 2d 1021 (Ut. 1987) no objection was made to the supplemental instructions. However, Justice Zimmerman, in a concurring opinion in State v. Thomas, says that the question of whether the giving of an Allen instruction is proper under the Utah Constitution or should be permitted as a matter of judicial administration remains open. (p. 451). The coercive instruction given here should be held to have been improper under both state and federal law and not mere harmless error, given the 13 1/2 hour deliberation of the jury.

VIII.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF AN AGGRAVATED ASSAULT ON RICHARD ANDERSON.

The evidence of aggravated assault came solely from the testimony of Richard Anderson. While Defendant denies his allegations, this issue must be examined in light of his testimony. He testified that he heard some noise outside his trailer, put on his clothes, opened the door and saw a man some distance away on the ground with four men around him, one of them being the Defendant. Although the distance from the door is not clear, the man on the ground, Mike, was not just outside that door (T. 372:14-17) but near the pallet at the door of a neighboring trailer (T. 373:23-374:1) and was between Anderson and the other four. (T.

374:23-24). Anderson started to step out and Defendant pulled his hand back with a crescent wrench in it, took one step, and said, "Do you want some of it, too?" Anderson stepped back in the trailer. (T. 319:10-14).

Utah Criminal Code 76-5-103 provides, in relevant part, that a person commits aggravated assault if he commits assault and uses a dangerous weapon. While conceding that a crescent wrench may constitute a dangerous weapon, an assault has not been shown.

Of the three types of assault, the Defendant was charged in the Information (Ct. Rcd. 3) (Addendum, Exhibit G) with alternative (b) of 76-5-102 which provides:

> (1) Assault is :
>
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another ...

The alleged conduct of the Defendant fails to establish "a show of immediate force or violence". This element necessarily requires close proximity and an overt act on the Defendant's part. See Am. Jur. 2d, Assault and Battery, Section 22. The Defendant's conduct in State v. Verdin, 595 P.2d 862 (Ut. 1979) which distinguished his conduct from that prohibited by 76-10-506, Threatening With or Using Dangerous Weapon in Fight or Quarrel, was that he attempted to pull the trigger of a firearm and declared an intention to "smoke" the officer. The conditional threat made at a distance in the instant case while pulling back a hand with a crescent wrench in it does not constitute "a show of immediate force or violence" so as to distinguish it from the misdemeanor of Threatening With a Dangerous Weapon under 76-10-506.

IX.

IT WAS IMPROPER FOR THE COURT TO ORDER AN INDIGENT DEFENDANT TO REIMBURSE THE COUNTY FOR ALL COSTS OF DEFENSE INCLUDING ATTORNEY'S FEES.

Rules 7(4)(e) and 8 of the Utah Rules of Criminal Procedure provide for appointment of counsel for an indigent defendant. Utah Code 77-32a-3 provides that in determining costs, the court shall take into consideration the financial resources of the Defendant and the nature of the burden that payment of costs will impose.

The court, after imposing a sentence of five years to life, ordered the Defendant to pay all costs including attorney's fees and restitution to the family of the deceased (T 953-955). No consideration was given to his lack of financial resources for the foreseeable future in prison. Such a sentence constitutes an abuse of discretion. It seeks to impose such an extreme burden while Defendant is in prison, or afterwards while on parole as to have a chilling effect on the Defendant or any other Defendant seeking appointment of counsel pursuant to their constitutional right to representation.

This case is to be distinguished from those involving probation where the Defendant has or is expected to secure employment after taking into account the Defendant's probable ability to pay. The order was contrary to the provisions of the Utah Code and in derogation of his rights to counsel under the state and federal Constitutions.

CONCLUSION

This court should remand the case to district court for a new trial on the homicide charge. The aggravated assault charge should be reduced to the offense of Threatening With or Using Dangerous Weapon in Fight or Quarrel or dismissed.

Respectfully submitted this 1st day of October, 1990.

Nathan Hult
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed four copies of the foregoing BRIEF OF APPELLANT to counsel for the Plaintiff/Appellee, R. Paul Van Dam, Attorney General's Office, 236 State Capitol Bldg., Salt Lake City, Utah, 84114, on the 1st day of October, 1990.

Nathan Hult

ADDENDUM

Exhibit A	Motion For Dismissal of Attorney
Exhibit B	Cabututan Trial Transcript, p. 270
Exhibit C	Jury Instruction 50
Exhibit D	Defendant's Proposed Instruction, p. 30
Exhibit E	Defendant's Proposed Instruction, p. 31
Exhibit F	A.B.A. Standards Relating to Trial, Section 5.4(a)
Exhibit G	Information

BRIGHAM DISTRICT

THE STATE OF UTAH

U.S.

FEB 5 3 58 PM '90

DONALD WAYNE BROWN CAUSE NO# 891049

Motion For Dismal OF Attorney
(THOMAS WILLMORE)

I the defendant (DONALD WAYNE BROWN) being of Sound mind wish at this time for the court, to REMOVE THOMAS WILLMORE from CAUSE NO # 891049. I do-not at this time think Att. THOMAS WILLMORE HAS REPERSENTED my CASE OR myself with the best of interest.

REASON BEING,

1. THOMAS WILLMORE IS NOT A CRIMINAL ATT. HE IS LISTED IN the LOGAN phone book under CIVAL ATTORNEY'S. ATT. WILLMORE HAS told me his self that he HAS hanidle very few CRIMINAL CASES in court. ATT. WILLMORE HAS NEVER REPERSENTED A CASE AS SERIOUS IN NATURE AS MINE.

2. ATTORNEY WILLMORE, told me things that HAS later turned out to be untrue.

3. The court GRANTED EACH defendant in this CASE. A PRIVATE INVESTIGATOR. ATT. WILLMORE.

that worked for the Uath Penal System, AND would be A very good for my case. I've ask Att. Willmore several times who she was. Friday 1-2-90 Att. Willmore, then tells me that all the defendands has had the same Priuate Investigator. A man by the name of Tim Franics who ive never talk to, has never ask me one question about anything concerning my case.

② There was a Supression hearing hold on evidence, with Sg. Lynn Yeates testified to matter concerning evidence that was taken from the scene. I've ask Att. Willmore to refile the motion, Allso to get transcripts of the hearing.

③ I've told Att. Willmore thing's About my case which he has went and disscuss with the court, and the other defendands Attorney's.

③ There was a Prelimiary Hearing held in this case, to show enough evidence, and cause to bourud myseft over for trial on A 1. dregee folovey 2nd degree murder charge. I am charged with knowingly an Intentionly causeing the death of Miguel Ramirez. There was no Intent

Two of the States wittiness testified that Donald Brown, didn't hit, Kick or use any kind of weapon on Miguel E. Ramierz. The thied wittiness, Richard Anderson, was clearly Impeach by my Att. Richard Anderson testified to many Incowsistent's in his testimony. Which he told the court that they were (All true. Transcripts with show). It in on court transcript that Richard Anderson was Impeached as a wittiness against mysefft. Att Willmore made this clear to Judge Daines.

(4) I ask Attorney Willmore to File motions for dissmals of the 2nd degree murder. For Reason's Ive have listed Aboue.

(5) Att. Willmore has contentously told me me there is nothing he can do About the state useing a Clearly Impeach wittiness against me in a trial.

For These Reasons, I would ask the court to Release Thomas Willmore formmy case. I am of sole mine, and I an not asking that another Att. be Appointed to my case. I believe it is my Cowstitutional Right to questions [illegible] and All wittiness

(6) Also I feel with Thomas Willmore as my Attorney that I could not get the REPERSENTATION in the court that I will NEED in a TRIAL in a case of this nature.

(7) AND LAST. It is my believe that Att. Willmore has let the court's handle my case without due process of law which I am intitled to in a court of law.

(8) I would Request that a hearing be held in this matter, AND myself be present to discuss this motion.

I Donald Wayne Brown state that the Statements above are true & correct to the best of my knowledge.

Defendant,

Donald Brown

Subscribed AND Sworn to before me this 5th day of Feb 1990.

Paul Halen

EXHIBIT B

MAYBE ALMOST BY THE BARREL.

Q ALL RIGHT. SO WHAT DID YOU DO THEN?

A I SAID ALL RIGHT, YOU KNOW, THE GUY STILL HAD HIM ON THE GROUND. I WALKED BACK TOWARD THE TRAILER, THIS TRAILER --

Q NOW, LET ME ASK YOU THIS: YOU SAID, ALL RIGHT.

A I SAID, ALL RIGHT. I GOT THE KNIFE AWAY FROM HIM.

Q WHO COULD YOU SEE AT THIS POINT IN TIME?

A NOBODY. I WAS IN THE DARK. BECAUSE, SEE, RIGHT HERE IT'S DARK.

Q OKAY.

A THE ONLY LIGHT IN THIS TRAILER WAS ONE RIGHT IN THE CENTER, IT'S A SOFT BULB. THE LIGHT -- BESIDES THE OTHER LIGHTS IN THIS TRAILER THERE, THE LIGHT'S NEVER ON.

Q OKAY. DID YOU EVER SEE THESE LIGHTS ON?

A NO. I NEVER SEEN ANYBODY IN THAT TRAILER LOOK OUT EITHER.

Q OKAY. SO YOU SAID YOU HAD ENOUGH. WHAT DID YOU DO?

A I WENT BACK IN THE TRAILER. I SAID, HEY, JUST KEEP HIM AWAY FROM ME.

Q OKAY. DID YOU HAVE ANYTHING WITH YOU?

A YEAH, I HAD THE WRENCH. NOBODY HAD THE WRENCH ~~BY~~ But ME. YOU KNOW, THAT'S WHAT THEY'RE FABRICATING.

Q OKAY. SO YOU GO BACK INTO TRAILER NUMBER THREE, IS THAT RIGHT?

A YES.

EXHIBIT C

INSTRUCTION NO. 50

The Court instructs the Jury that although the verdict to which each Juror agrees must, of course, be each Jurors own conclusion, and not a mere acquiescence in the conclusion of fellow Jurors yet, in order to bring eight minds to a unanimous result the Jurors should examine with candor the questions submitted to them, with due regard and deference to the opinions of each other. A dissenting Juror should consider whether their state of mind is a reasonable one, when it makes no impression on the minds of so many Jurors equally honest, equally intelligent who have heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath. You are not to give up a conscientious conclusion after you have reached such a conclusion finally, but it is your duty to confer with your fellow Jurors carefully and earnestly, and with a desire to do absolute justice both to the State and to the Defendant.

EXHIBIT D

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense or pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the qualify of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth and the administration of justice based thereon.

tlw/3/28

EXHIBIT E

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

The State of Utah and the Defendant both are entitled to the individual opinion of every juror. It is the duty of each of you after considering all of the evidence in the case, to determine, is possible, the question of guilt or innocence of the Defendant. When you have reached a conclusion in respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deduction to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he should abandon that original opinion and render his verdict according to his final decision.

tlw/3/29

EXHIBIT F

A.B.A. STANDARDS RELATING TO TRIAL BY JURY

5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors'

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

45 North First East
Brigham City, Utah 84302
Telephone: (801) 734-9464

EXHIBIT G

IN THE FIRST CIRCUIT COURT, BRIGHAM CITY DEPARTMENT

BOX ELDER COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. DON WAYNE BROWN, ADDRESS: Salt Lake City, Utah DOB: 12/01/55 RAYMOND PHILLIP CABUTEAN, ADDRESS: Salt Lake City, Utah DOB: 11/21/64 BILLY DONALD CAYER, ADDRESS: Salt Lake City, Utah DOB: 05/12/43 WILLIAM ROBERT CUMMINS, ADDRESS: Philadelphia, PA DOB: 12/25/60 Defendants.	INFORMATION Criminal No. _____

The undersigned, DALE WARD , under oath, states on information and belief that the defendants at Box Elder County, State of Utah, committed the crimes of:

COUNT I

MURDER IN THE 2nd DEGREE, A FELONY OF THE 1st DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th and 26th, 1989, IN VIOLATION OF Section 76-5-203, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID THE DEFENDANTS DID, INTENDING TO CAUSE SERIOUS BODILY INJURY TO Miguel Rameriz, COMMIT AN ACT OR ACTS CLEARLY DANGEROUS TO HUMAN LIFE, THAT DID CAUSE THE DEATH OF Miguel Rameriz, OR ACTING UNDER CIRCUMSTANCES

Case No. 5[illegible]59

DEC 28 1989

EVIDENCING A DEPRAVED INDIFFERENCE TO HUMAN LIFE, DID ~~RECKLESSLY~~ ENGAGE IN CONDUCT WHICH CREATED A GRAVE RISK OF DEATH TO Miguel Rameriz AND THEREBY CAUSED THE DEATH OF Miguel Rameriz.

COUNT II

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Raymond Phillip Cabutean DID ATTEMPT, WITH UNLAWFUL FORCE OR VIOLENCE, TO DO BODILY INJURY TO Eddie Apodaca AND IN DOING SO DID EITHER INTENTIONALLY CAUSE SERIOUS BODILY INJURY TO THE AFORESAID Eddie Apodaca OR DID USE A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY.

COUNT III

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Raymond Phillip Cabutean DID MAKE A THREAT, ACCOMPANIED BY A SHOW OF IMMEDIATE FORCE OR VIOLENCE, TO DO BODILY INJURY TO Sherman G. Galardo THROUGH THE USE OF A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY, TO WIT, A KNIFE.

COUNT IV

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Don Wayne Brown DID MAKE A THREAT, ACCOMPANIED BY A SHOW OF IMMEDIATE FORCE OR VIOLENCE, TO DO BODILY INJURY TO Richard C. Anderson, THROUGH THE USE OF A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY, TO WIT, A CRESCENT WRENCH.

COUNT V

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Don Wayne Brown DID MAKE A THREAT, ACCOMPANIED BY A SHOW OF IMMEDIATE FORCE OR VIOLENCE, TO DO BODILY INJURY TO Eddie Apodaca THROUGH THE USE OF A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY, TO WIT, A KNIFE.

COUNT VI

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Raymond Phillip Cabutean DID MAKE A THREAT, ACCOMPANIED BY A SHOW OF IMMEDIATE FORCE OR VIOLENCE, TO DO BODILY INJURY TO Sherman G. Galardo THROUGH THE USE OF A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY, TO WIT, A WRENCH.

COUNT VII

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Raymond Phillip Cabutean DID MAKE A THREAT, ACCOMPANIED BY A SHOW OF IMMEDIATE FORCE OR VIOLENCE, TO DO BODILY INJURY TO Eddie Apodaca THROUGH THE USE OF A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY, TO WIT, NUMCHUCKS.

COUNT VIII

AGGRAVATED ASSAULT, A FELONY OF THE 3rd DEGREE, AT: Box Elder County, Utah, ON OR ABOUT October 25th, 1989, IN VIOLATION OF Section 76-5-103, U.C.A. (1953, as amended), TO WIT, THAT ON OR ABOUT THE DATE AFORESAID, THE DEFENDANT Raymond Phillip Cabutean DID MAKE A THREAT, ACCOMPANIED BY A SHOW OF IMMEDIATE

FORCE OR VIOLENCE, TO DO BODILY INJURY TO Eddie Apodaca THROUGH THE USE OF A DEADLY WEAPON OR SUCH MEANS OR FORCE LIKELY TO PRODUCE DEATH OR SERIOUS BODILY INJURY, TO WIT, A WRENCH.

This information is based on evidence obtained from the following witnesses:

SHERMAN G. GALARDO, ERIC TILLEY, RICHARD C. ANDERSON, EDDIE APODACA, ROGER OLSEN, JIM SUMMERILL, LYNN YEATES, KENNY ADAMS, DALE WARD, MIKE JOHNSON, LARRY JOHNSTON, GREG SHEPHERD, DR. GRAY.

Dale Ward

DALE WARD, COMPLAINANT

Subscribed and sworn to before me this 27th day of Oct 19 67.

Robert W Daines

ROBERT W. DAINES, CIRCUIT JUDGE

AUTHORIZED FOR PRESENTMENT
AND FILING:
BOX ELDER COUNTY ATTORNEY
ROGER F. BARON, DEPUTY